

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 15, 2008 Session

STEVEN HAMRICK, ET AL. v. LISA LEWIS

**Appeal from the Circuit Court for Knox County
No. 3-319-05 Wheeler A. Rosenbalm, Judge**

No. E2007-02414-COA-R3-CV - FILED DECEMBER 18, 2008

This appeal involves questions of uninsured motorist (“UM”) insurance coverage under three separate policies of insurance. Mary Katherine Hamrick, the administrator of the estate of her late father, Edward Wallace, was killed in a vehicular accident while driving a car owned by Mr. Wallace’s estate. Ms. Hamrick’s children brought this action against the alleged tortfeasor and served notice of their claims to UM benefits under three policies: (1) Mr. Wallace’s personal automobile insurance policy, issued by Allstate Insurance Company; (2) Mr. Wallace’s personal umbrella insurance policy, issued by Allstate Insurance Company; and (3) Ms. Hamrick’s personal automobile insurance policy, issued by American National Property and Casualty Company (“ANPAC”). Upon review, we affirm in part and reverse in part. We affirm the judgment of the trial court that Ms. Hamrick did not have UM coverage under the express provisions of the Allstate insurance policies at issue because: (1) Ms. Hamrick was not driving the car “with permission” of the named insured under Mr. Wallace’s auto insurance policy because he had been dead for nearly four years at the time of the accident, and (2) Ms. Hamrick did not fall under the definition of “insured” under Mr. Wallace’s umbrella policy. We also affirm the trial court’s judgment that Allstate was not barred by principles of waiver or estoppel to deny coverage under its policies. We reverse the judgment of the trial court that Ms. Hamrick did not have UM coverage under her automobile policy because she is defined by the policy, without qualification, as being an “insured person” and, therefore, entitled to UM coverage under the express terms of her policy.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part,
Reversed in Part, and Remanded**

SHARON G. LEE, SP. J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Thomas S. Scott, Jr., and Christopher T. Cain, Knoxville, Tennessee, for the Appellants, Steven Hamrick, Trish Hamrick, and Michael Hamrick, individually and as Administrators of the Estate of Mary Katherine Hamrick, and as Administrators of the Estate of Edward L. Wallace.

Alan M. Sowell and Nathaniel K. Cherry, Nashville, Tennessee, for the Appellee, Allstate Insurance Company.

James Y. “Bo” Reed, Knoxville, Tennessee, for the Appellee, American National Property and Casualty Company.

OPINION

I. Background

Edward Wallace had two policies of insurance issued by Allstate: an automobile insurance policy on his 2000 Lincoln LS and a personal umbrella policy that contained, among other things, a UM coverage provision. Mr. Wallace died on September 1, 2000, leaving his wife, Evelyn Wallace, who was a named insured under the policies as his spouse, and his daughter, Ms. Hamrick, who was named administrator of his estate. Ms. Wallace died on November 5, 2002. Allstate was not notified of Ms. Wallace’s death and consequently continued to send renewal notices and accept premium payments thereafter.

On June 15, 2004, Ms. Hamrick was involved in an automobile accident while driving the Lincoln that was still owned by her father’s estate at the time, and she died from injuries incurred in the accident. At the time of the accident, Ms. Hamrick had her own automobile insurance policy, including UM coverage, that was issued by ANPAC. Her children brought this action against the driver of the other vehicle, Lisa Lewis, and also served notice to Allstate and ANPAC of its claims under the UM provisions of the policies alleged to provide Ms. Hamrick UM coverage. Ms. Lewis answered and admitted fault in the accident. Allstate and ANPAC denied that Ms. Hamrick had UM coverage under the terms of the various policies. Following discovery and the trial court’s denial of motions for partial summary judgment filed by both Allstate and the plaintiffs, a hearing on the coverage issues took place on August 22 and 23, 2007.

The trial court ruled that there was no coverage under the Allstate automobile policy and umbrella policy because Ms. Hamrick did not fall within the definition of an “insured” under the terms and conditions of the policies. The trial court also held that Ms. Hamrick was not covered under her ANPAC insurance policy because the Lincoln was furnished or available for her regular use, which disqualified her from UM coverage pursuant to the terms of the policy.

II. Issues Presented

The plaintiffs appeal, raising the following issues, as stated in their brief:

1. Whether the trial court erred in finding that Ms. Hamrick did not qualify as an insured under Mr. Wallace’s personal automobile policy and/or personal umbrella policy with Allstate.
2. Whether the trial court erred in finding that Ms. Hamrick was not an “insured” under her ANPAC policy because she was operating a non-owned automobile furnished or available for her regular use at the time of the accident.

III. Analysis

A. Standard of Review

In a non-jury case such as this one, we review the record de novo with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); ***Union Carbide v. Huddleston***, 854 S.W.2d 87, 91 (Tenn.1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. ***Seals v. England/Corsair Upholstery Mfg. Co., Inc.***, 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are reviewed de novo and are accorded no presumption of correctness. ***Campbell v. Fla. Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

B. Availability of Uninsured Motorist Coverage

In the case of ***Naifeh v. Valley Forge Life Insurance Co.***, 204 S.W.3d 758 (Tenn. 2006), the Tennessee Supreme Court restated the following well-established principles that guide our courts in the interpretation of an insurance policy:

In interpreting an insurance contract, we must determine the intention of the parties and give effect to that intention. ***Christenberry v. Tipton***, 160 S.W.3d 487, 494 (Tenn. 2005); ***Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.***, 521 S.W.2d 578, 580 (Tenn.1975). An insurance policy must be interpreted fairly and reasonably, giving the language its usual and ordinary meaning. ***Parker v. Provident Life & Acc. Ins. Co.***, 582 S.W.2d 380, 383 (Tenn. 1979). When there is doubt or ambiguity as to its meaning, an insurance contract must be construed favorably to provide coverage to the insured. ***Christenberry***, 160 S.W.3d at 494. However, the contract may not be rewritten by the Court. ***Id.***; see also ***Tenn. Farmers Mut. Ins. Co. v. Witt***, 857 S.W.2d 26, 32 (Tenn. 1993).

Naifeh, 204 S.W.3d at 768.

1. Mr. Wallace's Personal Automobile Policy with Allstate

Mr. Wallace's automobile insurance policy provides as follows in relevant part:

Insured Persons:

1. **You** and any **resident** relative.
2. Any person while in, on, getting into or out of an insured auto with **your** permission.
3. Any other person who is legally entitled to recover because of **bodily injury** to **you**, a **resident** relative, or an occupant of **your** insured auto with **your** permission.

* * *

Transfer:

This policy can't be transferred to anyone without **our** written consent. However, if **you** die, coverage will be provided until the end of the policy period for:

1. **Your** legal representative while acting as such, and
2. Persons covered on the date of **your** death.

* * *

“You” or **“Your”** – means the policyholder named on the declarations page and that person's **resident** spouse.

(Emphasis in original). Ms. Hamrick was not a “resident relative” at the time of the accident because she did not reside in the Wallaces’ household. Plaintiffs argue that Ms. Hamrick was an “insured person” because she was in the insured auto (the Lincoln) with permission at the time of the accident. The trial court disagreed, holding that “at the time of Ms. Hamrick’s unfortunate experience, death, neither Mr. Wallace nor Ms. Wallace were alive and, therefore, neither could give permission.”

At the time of the accident that caused Ms. Hamrick’s death, Mr. Wallace had been deceased for nearly four years, and Ms. Wallace had been deceased for about one and a half years. Ms. Hamrick drove the Lincoln with her parents’ permission while they were alive. After they died, the Lincoln remained parked at the Wallaces’ former residence until shortly before the accident, and Ms. Hamrick was in possession of the only set of keys. The testimony of her son, plaintiff Steven Hamrick, indicates that Ms. Hamrick kept the Lincoln in service and drove it infrequently, generally preferring to drive her own Ford Mustang. It appears no Tennessee court has directly addressed the question of whether the concept of “permission” to drive a vehicle extends beyond the death of the one giving permission for so long a period as presented here. We believe the trial court was correct in determining that, giving the language of the insurance contract its usual and ordinary meaning, Ms. Hamrick did not have the required permission of the named insureds at the time of the accident because both named insureds were deceased. The policy covers persons while in an insured auto “with your permission” and “your” is defined as “the policyholder named on the declarations page

and that person's resident spouse." Had the policy provided broader language such as "with the permission of the owner," our analysis would likely be different; but because the named insureds, the Wallaces, clearly were not capable of giving the permission required by the policy because they were dead, the policy does not provide Ms. Hamrick coverage under these circumstances.

The plaintiffs further argue that "Ms. Hamrick, as executor of Mr. Wallace's estate, became the 'you' under the Allstate policies," or in other words, that Ms. Hamrick became a named insured under the policies by virtue of being appointed the executor of his estate, citing Tenn. Code Ann. §§ 35-50-105 and -110, which generally provide executors with authority to take certain actions in administering an estate. This argument, however, is directly contrary to the express terms of the insurance contract, which provides a clear definition of the terms "you" and "your." Nothing in the cited statute requires or authorizes a court to rewrite a deceased's insurance policy to expand insurance coverage to an executor that was not provided in the original contractual agreement.

The automobile policy also provides that "if **you** die, coverage will be provided until the end of the policy period for your legal representative while acting as such." The trial court held that "unfortunately, there is no evidence in this case to even remotely suggest that at the time of Ms. Hamrick's accident, she was operating the subject vehicle in the course of conducting estate business or acting as the legal representative of Mr. Wallace's estate." It appears that no one had any knowledge of why Ms. Hamrick chose to drive the Lincoln that day or what the purpose of her errand was; in any event, there was no testimony presented on those issues. Because the policy provides coverage to a legal representative after death only "while acting as such," and there was no proof that Ms. Hamrick was acting as such at the time of the accident, we affirm the trial court's conclusion that this policy provision is of no avail to the plaintiffs.

Finally, the plaintiffs argue that Allstate waived reliance on the above-discussed policy provisions by continuing to send renewal notices and accepting premiums on Mr. Wallace's automobile policy and his personal umbrella policy after Allstate knew of Mr. Wallace's death. However, it is undisputed that at the time of the accident, no representative or agent of Allstate had been informed of Ms. Wallace's death. The concept of waiver "has long been defined in the Tennessee cases as the voluntary relinquishment of a known right." *Dallas Glass of Hendersonville, Inc. v. Bituminous Fire & Marine Ins. Co.*, 544 S.W.2d 351, 354 (Tenn. 1976); *accord Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 819 (Tenn. 2003). Because Allstate was not informed of the death of Ms. Wallace, a named insured as a resident spouse under the policies, the argument that Allstate is barred from reliance on the policy terms by operation of waiver or estoppel because of its continued sending of renewal notices and acceptance of premiums is without merit.

2. Mr. Wallace's Personal Umbrella Policy with Allstate

Mr. Wallace's personal umbrella insurance policy with Allstate included a UM coverage provision defining "insured" more narrowly than did the automobile policy, stating as follows in pertinent part:

"Insured" means:

a) **you**, and

b) any person related to **you** by blood, marriage or adoption who resides in **your** household.

* * *

“You” or **“Your”** means the person named in the declarations.

(Emphasis in original). Because Ms. Hamrick was not named in the declarations and did not reside in the Wallaces’ household, we affirm the trial court’s judgment that she was not an insured under the personal umbrella policy.

3. Ms. Hamrick’s Automobile Insurance Policy with ANPAC

Ms. Hamrick’s auto insurance policy provides as follows in pertinent part:

We will pay damages which an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of **bodily injury** and **property damage**.

* * *

“Insured person” means:

(a) **you** or a **relative**;

(b) any other person while **occupying your insured car** if such use is within the scope of **your** permission; and

(c) **you** or any other person while **occupying a non-owned car**, provided **you** are driving the **non-owned car** and the use is within the permission of the owner and within the scope of such permission.

* * *

“Non-owned car” means a car . . . not owned, in whole or in part, furnished or available for the regular use of either you, your spouse or a relative.

(Emphasis in original).

Based on the following facts, the trial court ruled that Ms. Hamrick was not an “insured person” under her automobile insurance policy. Steven Hamrick testified that the Lincoln was parked at the house of his grandparents, the Wallaces, from the time Ms. Wallace died until around March of 2004, three months before the accident, when Ms. Hamrick took it to her house. Mr.

Hamrick stated that although Ms. Hamrick generally preferred to drive her Mustang, he didn't know anything about his mother's use of the Lincoln after Ms. Wallace's death. Ms. Hamrick was the only one that had keys to the Lincoln and the only one to use it. Finally, Mr. Hamrick testified that the Lincoln was available for his mother's use anytime she wanted to use it, and that it was available for the use of no one else. Based on these facts, the trial court held that the Lincoln was "furnished or available for the regular use" of Ms. Hamrick and consequently that it was not a "non-owned car" within the scope of the policy definition of that term.

We agree with the trial court that the Lincoln was "furnished or available" for Ms. Hamrick's regular use. However, this fact means only that subsection (c) of the provision defining "insured person" is inapplicable. One important subsection remains – the one that states "**Insured person** means: (a) **you** or a **relative**." This definition is unambiguous and unqualified. The policy defines "you" as "the Policyholder named in the Declarations," which is Ms. Hamrick. If ANPAC intended to place any qualification or limitation on these definitions, it should have included such limitation in the language of the policy. To the extent that subsection (c) injects any possible ambiguity into the question of coverage, our Supreme Court has noted that "when there is doubt or ambiguity as to its meaning, an insurance contract must be construed favorably to provide coverage to the insured." *Naifeh*, 204 S.W.3d at 768. Because the policy provides without qualification that "Insured person" means "you" and Ms. Hamrick is defined as "you," we hold that UM coverage is available to Ms. Hamrick under her ANPAC automobile policy.

IV. Conclusion

The judgment of the trial court that Ms. Hamrick had no UM coverage under the two Allstate policies issued to her late father is affirmed. The judgment of the trial court that Ms. Hamrick had no UM coverage under her ANPAC automobile insurance policy is reversed, and the case remanded for such further action as may be necessary, consistent with this opinion. Costs on appeal are assessed one-half to the Appellants, Steven Hamrick, Trish Hamrick, and Michael Hamrick, individually and as Administrators of the Estate of Mary Katherine Hamrick, and as Administrators of the Estate of Edward L. Wallace; and one-half to the Appellee, American National Property and Casualty Company.

SHARON G. LEE, SPECIAL JUDGE